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May 31, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

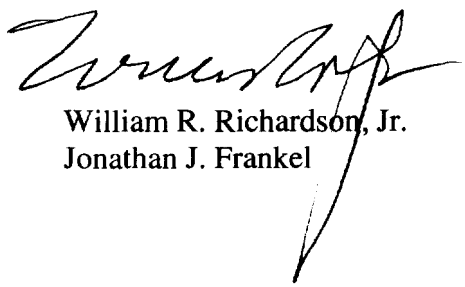
Re: Ex Parte Presentation
Gen Docket No. 00-185
Inquiry Concerning High Speed Access to the
Internet Over Cable and Other Facilities

Dear Ms. Salas:

On behalf of Qwest Communications International, Inc. ("Qwest"), this is to notify the Commission that on May 30, 2001, Melissa Newman of Qwest and the undersigned met with W. Kenneth Ferree, Marjorie Reed Greene, and John B. Norton of the Cable Services Bureau. The purpose of the meeting was to discuss the broad array of Qwest's services, including its VDSL operations and out-of-region services, as well as to address Qwest's concerns about regulatory parity in the deployment of broadband services, as summarized in the prior filings attached hereto, copies of which were provided to the participants. Qwest emphasized its interest in ensuring parity of deregulation among broadband providers, and the Commission's statutory discretion to adopt a market-based approach to broadband services applicable both to incumbent LECs and incumbent cable operators.

The original and one copy are enclosed for filing pursuant to Section 1.1206 of the Commission's rules. Should you have any questions, please communicate with the undersigned.

Sincerely,



William R. Richardson, Jr.
Jonathan J. Frankel

Enclosure

cc: W. Kenneth Ferree
Marjorie Reed Greene
John B. Norton

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses and	)	CS Docket No. 99-251
Section 214 Authorizations from	)	
	)	
MEDIAONE GROUP, INC.,	)	
Transferor	)	
to	)	
AT&T CORPORATION,	)	
Transferee	)	

To: The Commission

PETITION OF U S WEST TO DENY APPLICATIONS OR TO CONDITION ANY GRANT

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August 23, 1999

II. ABSENT CONSIDERATION OF THE REGULATORY SCHEME APPLICABLE TO COMPETING DSL SERVICES, THE MERGER WILL SOLIDIFY AT&T'S ARTIFICIAL REGULATORY ADVANTAGES IN THE PROVISION OF BROADBAND INTERNET ACCESS, IN VIOLATION OF THE PRINCIPLE OF TECHNOLOGICAL NEUTRALITY EMBODIED IN SECTION 706 OF THE ACT.

The proposed acquisition by AT&T of the cable systems owned by MediaOne, and of MediaOne's additional 25.5% partnership interest in the cable systems owned by TWE, also raises serious issues with respect to the state of competition in the emerging market for high speed Internet access. As noted in part I, a merged AT&T/MediaOne would have cognizable influence over 60% of potential high speed cable Internet access subscribers. Moreover, the merger would join AT&T's controlling interest in Excite@Home with MediaOne's 35% interest in Road Runner, thus aligning the two leading providers of this new service — which currently provide service to 90% of all cable modem subscribers.[40/]

As Congress recognized in Section 706, this new service will be critical to the future development of the Nation's economy. The popularity of high speed Internet access, offering far quicker and more convenient access to the burgeoning supply of information available over the Internet, has led to unprecedented growth of this new service — perhaps greater than any other communication service of the twentieth century. This rapid growth is completely inconsistent with AT&T's unsupported assertion that broadband and narrowband Internet access constitute a single market, and the proposition is totally illogical. It is similar to the argument that the automobile and the horse and buggy were part of the same market because,

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[40/] Excite@Home serves about 620,000 cable modem subscribers, and Road Runner serves about 340,000. Together these two account for over 90% of today's total cable modem subscribers. *See* Cable Modem Info Center, Cable Modem Market Stats & Projections <http://www.cabledatacomnews.com/cmic/cmic16.html>.

in the beginning, owners of the latter outnumbered owners of the former. As the Commission has noted, demand for broadband capability is growing rapidly, because it provides "many *new* services and vast improvements to existing services" — including "real-time video," the ability to "download feature-length movies in a matter of minutes," "chang[ing] web pages as fast as changing the channel on a television," and "increased prospects for at-home learning and working."[41/] Investment of "tens of billions of dollars" in broadband outpaces that of other industries, and is "large even by the standards of America's communications business."[42/] AT&T's assertion that broadband and narrowband are fungible is belied by AT&T-controlled @Home, which considers broadband to be far superior to "typical" narrowband connections: "the @Home experience . . . includes Internet service over hybrid fiber co-axial, or HFC, cable at transmission speeds up to 100 times faster than typical dial-up connections, 'always on' connection and rich multimedia programming through our broadband Internet portal."[43/]

But whether or not broadband is currently a separate market,[44/] AT&T's merger raises substantial concerns about the future of broadband competition. Cable is currently far and

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41/ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, FCC 99-5, at ¶ 3 (rel. Feb. 2, 1999) ("*706 Report*") (emphasis added).

42/ *Id.* at ¶ 35.

43/ At Home Corp., Form 10-K for the Fiscal Year Ended Dec. 31, 1998, at 3 (filed Feb. 9, 1999).

44/ To the extent this factual question is relevant to the Commission's analysis, the Commission cannot grant the application without first holding a hearing to resolve it. *See* 47 U.S.C. § 309(e). *Cf. Radio Athens, Inc. v. Federal Communications Commission*, 401 F.2d 398 (D.C. Cir. 1968).

away the leading delivery mechanism for broadband Internet access. Of those homes with a broadband Internet connection today, about one million receive broadband service over cable.[45/] By contrast, only 100,000 subscribers currently rely on DSL.[46/] Cable modem services thus already have a substantial headstart over DSL, and as noted above, @Home and Road Runner together serve nearly all these cable modem subscribers.

In these circumstances, this merger presents the Commission with a critical choice. One the one hand, the proposed merger would affiliate AT&T with over 90% of cable-based broadband access to the Internet. AT&T's Chairman has stated repeatedly that imposition of any open access requirements on broadband Internet access by cable companies, no matter how unobtrusive, would utterly decimate the ability of AT&T to invest in broadband technology. In his view, "[n]o company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others."[47/] The Commission has indicated some significant sympathy with this position — and the concomitant

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45/ *See* Cable Modem Info Center, Cable Modem Market Stats & Projections <http://www.cabledatacomnews.com/cmic/cmic16.html>; *see also* Mike Farrell, *Cable-Modem Count Nears 1M*, Multichannel News, July 26, 1999, at 3 ("Cable-modem penetration in North America is expected to break the 1 million-customer milestone next month, as subscriber numbers for the two top data-over-cable-service providers — Excite@Home and Road Runner — increased significantly in the second quarter.").

46/ *See Cable Telephony To Penetrate over 10% of Homes Passed by 2005*, PR Newswire, July 22, 1999.

47/ C. Michael Armstrong, AT&T Chairman & CEO, *Telecom and Cable TV: Shared Prospects for the Communications Future* at 4, Washington Metropolitan Cable Club, Washington, D.C., Nov. 2, 1998, *available at* <http://www.att.com/speeches/98/981102.maa.html).

position that AT&T should be able to deploy broadband Internet access without any open access requirements.

On the other hand, the Commission has proposed saddling the main facilities-based competitors to this increasingly dominant market player — incumbent LEC services, both directly to customers and to competitive providers of broadband services — with unbundling, access, pricing, and other rules and regulations which are many times more burdensome than those that anyone is even whispering should be applied to AT&T. There is a clear disconnect here — a kind of "schizophrenic infrastructure regulation" that "hyperregulate[s]" only those entities likely to provide any competition to this new AT&T behemoth, while adopting a "laissez-faire approach" to AT&T.[48/]

We submit that this merger — which will vault AT&T into a position of access to over 90% of all cable modem subscribers — cannot be reviewed without consideration of this regulatory disconnect. As the Commission has recently recognized, the absence of technological neutrality "might undermine the objectives of section 706 by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans."[49/] If the Commission continues to permit AT&T to offer cable modem service without regulatory restrictions, and to

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48/ *The Internet Freedom Act and the Internet Growth and Development Act of 1999: Hearings on H.R. 1686 and H.R. 1685 Before the House Judiciary Committee*, June 30, 1999, at 10 (statement of Scott Cleland, Managing Director, Legg Mason Precursor Group).

49/ Brief for the Federal Communications Commission as Amicus Curiae at 25-26, *AT&T Corp. v. City of Portland* (9th Cir. filed Aug. 16, 1999) (No. 99-35609).

require ILECs alone to provide broadband transmission capacity to other competitors,[50] its actions will do just that.

The Commission has long held that the public interest factors governing its review of merger applications must include consideration of principles of competitive neutrality.[51] As Commissioner Powell has cautioned, "[w]e should not dare to pick technology winners or losers, whether consciously or unconsciously."[52] Under the pro-competitive principles underlying the 1996 Act, that is the role of the marketplace. And one corollary to this principle is clear: "To raise the costs of one industry player but not the cost to others to whom the condition rationale also runs, seems patently unfair and will skew competitive development."[53]

These concerns are not new. The Commission has recognized, since the very outset of its consideration of high speed Internet access service, that "it may distort the performance of the market to have separate regimes of regulation for competitors in a converging

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[50] *See* Motion of Federal Communication Commission for Remand To Consider Issues, U S WEST Communications, Inc. v. FCC (D.C. Cir. filed June 22, 1999) (No. 98-1410); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-70 (rel. April 16, 1999).

[51] *See, e.g., Merger of MCI Communications Corp. and British Telecommunications plc*, 12 FCC Rcd 15351,15365 n.46 (1997).

[52] Commissioner Michael K. Powell, Federal Communications Commission, *Technology and Regulatory Thinking: Albert Einstein's Warning*, Legg Mason Investor Workshop March 13, 1998, *available at* <http://www.fcc.gov/Speeches/Powell/spmkp804.html>.

[53] Commissioner Michael K. Powell, Federal Communications Commission, *"Letting Go of the Bike": A Holiday Parable on Communications Mergers in a Season of Competition*, Practicing Law Institute Dec. 10, 1998, *available at* <http://www.fcc.gov/Speeches/Powell/spmkp820.html>.

market."[54] Indeed, as the Commission advised the Ninth Circuit only a week ago in the *City of Portland* case, the Commission determined in its Section 706 report that it was the intent of Congress that "our broadband policy be technologically-neutral."[55] Chairman Kennard, too, has cited technological neutrality as one of the seven principles central to promoting the rapid deployment of these critical new services.[56] While "AT&T . . . prefer[s] gaming the regulatory process to competing in the marketplace," the failure to consider the consequences of this regulatory disconnect "seriously threaten[s] . . . the availability of high-speed data service on fair and affordable terms."[57]

The Commission never addressed this problem in its review of the AT&T/TCI merger. In that case, it bypassed the question because it concluded that "the open access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur."[58] This horizontal merger, however, clearly requires consideration of the problem, because it significantly expands AT&T's cable modem service interests. It thereby threatens to permit

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[54] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Notice of Inquiry, 13 FCC Rcd 15280, 15281 ¶ 4 (1998).

[55] Brief of the Federal Communications Commission as Amicus Curiae at 29, *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir. filed Aug. 16, 1999) (quoting *706 Report* at ¶ 74).

[56] *See Chairman William E. Kennard Receives Alliance for Public Technology Pioneer Award; Outlines Guidelines for Bandwidth*, Federal Communications Commission, News (Feb. 27, 1998), *available at* <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1998/nrmc8018.html>.

[57] *McCain Bill To Ensure Regulation-Free Internet*, Press Release (May 13, 1999) *available at* <http://www.senate.gov/~mccain/intfree.htm>.

[58] *TCI Order* at 3207 ¶ 96.

AT&T to use regulatory asymmetry to advance an insurmountable headstart in this important new service. Perhaps this regulatory disconnect was once legitimately viewed as an industry-wide concern. But the plain fact is that with this merger AT&T has now *become* the industry. The time to act is thus here and now — before the injury to competition by DSL providers becomes irreparable. In the absence of any changes to the Commission's DSL regulatory policies, this merger cannot be granted consistent with Section 706 absent an open access condition.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Transfer of Control of Licenses and	)	CS Docket No. 99-251
Section 214 Authorizations from	)	
	)	
MEDIAONE GROUP, INC.,	)	
Transferor	)	
to	)	
AT&T CORPORATION,	)	
Transferee	)	

To: The Commission

REPLY OF U S WEST TO REPLY COMMENTS OF AT&T AND MEDIAONE

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Counsel for U S WEST, INC.

September 29, 1999

II. AT&T HAS NO REAL RESPONSE TO THE REQUIREMENTS OF SECTION 706 WITH RESPECT TO TECHNOLOGICAL NEUTRALITY BETWEEN CABLE MODEM AND DSL SERVICES.

This merger also increases substantially the reach of AT&T's already dominant cable modem service offerings throughout the United States. And it merges AT&T's control of Excite@Home with MediaOne's interest in the principal cable modem service competitor to Excite@Home, Road Runner — an interest AT&T now admits (for the first time) would provide it with negative control of Road Runner.[66/] The merger thus would align the two providers that currently provide service to at least 90% of all cable modem subscribers.[67/]

In these circumstances, as U S WEST urged in its petition, the Commission cannot evaluate this merger without consideration of the effects on competition of continuing to handicap competing DSL providers of high speed Internet access service[68/] with substantial loop unbundling, DSLAM collocation, and other obligations that are part of what Chairman Kennard

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66/ *See* AT&T Reply Comments at 89 n.276.

67/ *See* Petition of U S WEST To Deny Applications or To Condition Any Grant at 14 n.40, in *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corporation, Transferee*, CS Docket No. 99-251 (filed Aug. 23, 1999) ("U S WEST Petition").

68/ AT&T's efforts to avoid compliance with regulatory obligations applicable to all others is premised in significant part on the argument that only by granting its application will the Commission spark competition by DSL providers. This is pure rhetoric. U S WEST, for one, has been actively planning and deploying DSL service since well before AT&T even announced its merger with TCI. *Compare* U S WEST, Inc., *U S WEST Brings Lightning Fast New Internet Access to Homes in 40 Cities by June 1998; Nation's 1st Regionwide Deployment of High-Power ADSL Internet and Data Networking*, January 29, 1998 <http://www.uswest.com/news/012998.html> *with* AT&T Corp., *AT&T, TCI To Merge, Create New AT&T Consumer Services Unit*, June 24, 1998 <http://www.att.com/press/0698/980624.cha.html>.

has recently characterized as a "morass of regulation."[69] Failing to consider these competitive effects would be inconsistent with the principle of technological neutrality reflected in Section 706 of the Act, which expressly directs the Commission to encourage the deployment of advanced telecommunications capability "without regard to any transmission media or technology," and to do so "by utilizing . . . measures that promote competition in the local telecommunications market." 47 U.S.C. § 157 note. No better example of this problem can be found than that of line sharing. In its reply comments, AT&T argues that "control and management by a single entity is necessary to ensure that one use does not interfere with, or degrade the quality of, another subscriber offering."[70] Given the policies underlying Section 706, this argument certainly cannot be accorded any greater force here than the very same argument advanced by ILECs with respect to the Commission's pending line sharing proposal — *a proposal that AT&T does not support.*[71]

Although continuing to pound the table about how regulations "would reduce investment in cable infrastructure and deny or delay the availability"[72] of its own advanced service offerings, AT&T sneers at ILECs' concerns about the need for technological neutrality as

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[69] Remarks of Chairman Kennard at NATOA 19th Annual Conference, Sept. 17, 1999, at 6.

[70] AT&T Reply Comments at 123.

[71] *See* Reply Comments of U S WEST Communications, Inc. at 18-22, in *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed July 22, 1999).

[72] AT&T Reply Comments at 106.

a "crude appeal to playground justice."[73] However "crude" AT&T perceives this statutory policy to be, the Commission has long recognized the force of it.[74] Indeed, in asserting the primacy of its statutory authority in this area, the Commission has recently cautioned the Ninth Circuit in the Portland case that regulatory disparity between AT&T and competing ILEC broadband service providers "might undermine the objectives of section 706 by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans."[75] The CRTC has reached the same "crude" conclusion in Canada.[76]

AT&T itself is quick to recognize the "significant competitive advantage" afforded those who provide service "free of the onerous regulations that apply to their . . . counterparts" using different technologies.[77] But in its view, regulatory asymmetry at the expense of ILECs — in an emerging market for high speed Internet access that Excite@Home and Road Runner currently *dominate* — is just fine. First, AT&T argues, "[d]ifferential regulation is . . . necessary to prevent ILECs from abusing their bottleneck monopolies."[78] Second, AT&T asserts that it alone has taken "substantial risk" in developing and deploying

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[73] Ordover-Willig Declaration ¶ 79.

[74] *See* U S WEST Petition at 18-19.

[75] Brief of the FCC as Amicus Curiae at 26, *AT&T Corp. v. City of Portland* (9th Cir. filed Aug. 16, 1999) No. 99-35609.

[76] *See Regulation Under the Telecommunications Act of Cable Carriers' Access Services*, Telecom Decision CRTC 99-8 (July 6, 1999), at ¶ 44; *Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by "Broadcast Carriers,"* Telecom Decision CRTC 98-9 (July 9, 1998), at ¶ 76.

[77] AT&T Reply Comments at 59-60 (addressing DBS operators).

[78] AT&T Reply Comments at 126.

broadband facilities, while ILECs have done so "in a protected regulatory environment."[79/] Finally, AT&T argues that cable companies *alone* enjoy First Amendment protections in deploying broadband facilities.[80/] These arguments require little response.

There is nothing about the facilities or customer relationships of an ILEC that makes it a more appropriate subject of regulation in this new market than AT&T would be — as the party controlling the two dominant providers, Excite@Home and Road Runner. Each controls critical facilities into the home (cable "last miles" in the case of AT&T, and telephone local loops in the case of an ILEC) that have heretofore been used to supply a regulated monopoly service, and that can be upgraded through substantial investments to supply broadband services. Each has customer relationships with residential subscribers that, until recently, have been relatively immune from competition.

Nor is there any basis to AT&T's claim that it alone has borne investment "risk" in deploying broadband services. The underlying facilities of both parties — cable wiring in the case of AT&T, and local loops in the case of the ILEC with which it will be competing — were installed under a regime of regulated monopoly (albeit far less closely supervised in the case of AT&T's cable systems). In both cases, the upgrades required to convert those facilities to supply broadband services require significant investments to implement new technologies that entail business risks; the rate of return will be determined by the investing company's performance in the broadband marketplace. Yet only the ILEC is currently subject to the "quicksand of

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79/ *Id.* at 113.

80/ *See id.*

regulation" that AT&T argues substantially diminishes the incentives necessary to make these business investments, and that Chairman Kennard has urged is "not good for America."[81]

AT&T's First Amendment argument is truly Orwellian. Its view is that, while all broadband providers are equal, some are more equal than others under the Constitution, because they and they alone qualify as "speakers." To state this remarkable proposition is to reject it. The issue here is not what "the historic role"[82] of cable operators and telephone companies may have been in their respective delivery of video programming and telecommunications services. It is what rights they both may have in competing in the wholly new market for advanced services. The notion that the First Amendment discriminates in favor of some providers of broadband services over others because of their genealogy is obviously the very antithesis of what that Amendment was designed to accomplish.

Ultimately, AT&T is forced to fall back on the untenable position that — despite the clear thrust of Section 706 — Congress enacted a regulatory scheme that the Commission must construe to *require* disparate regulation. As the Commission has advised the Ninth Circuit, however, its statutory authority makes it uniquely qualified to *prevent* "regulatory disparity."[83]

81/ Remarks of Chairman Kennard, *supra* note 69, at 6.

82/ AT&T Reply Comments at 122.

83/ Brief of the FCC as Amicus Curiae at 26, *AT&T Corp. v. City of Portland* (9th Cir. filed Aug. 16, 1999) No. 99-35609. AT&T repeats its arguments, rejected by the district court in the Portland litigation, that the Commission (like Portland) would be barred under the Act from regulating AT&T's provision of advanced services to ensure the kind of technological neutrality required by Section 706. For a rebuttal of these arguments (without reference to *the Commission's* authority under Title I or Section 706), see Opposition Brief of Defendant-Intervenor-Appellees U S WEST Interprise America, Inc., GTE Internetworking Inc., and OGC Telecomm, Ltd. at 31-46, *AT&T Corp. v. City of Portland* (9th Cir. filed Sept. 7, 1999) No. 99-35609.

And the time to exercise that authority is here and now — before the injury to competition in this nascent market for advanced services becomes irreparable.

CONCLUSION

For the reasons set forth above and in U S WEST's original petition, any grant of these applications should be conditioned on (1) a requirement of divestiture of attributable interests in cable systems sufficient to comply with the Commission's 30% cap, within 60 days following issuance of the D.C. Circuit mandate upholding that cap, and (2) a requirement of nondiscriminatory access to AT&T's cable modem facilities, so long as DSL providers are required to comply with loop unbundling, line sharing, DSLAM collocation, and other regulatory burdens.